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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1377

JOSEPH BONACORSA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 528 F.2d 1218.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1976. A petition for rehearing with suggestion of rehearing *en banc* (Pet. App. 31a-32a) was denied on February 26, 1976. The petition for a writ of certiorari was filed on March 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was improper to call petitioner, a potential defendant, before the grand jury.

2. Whether questions to which petitioner gave willfully false responses were fatally ambiguous or were open to a reasonable interpretation as to which his responses were truthful.

3. Whether there was a material variance between the indictment and the proof at trial.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of perjury, in violation of 18 U.S.C. 1623, and obstruction of justice, in violation of 18 U.S.C. 1503. Petitioner was sentenced to concurrent terms of two years' imprisonment, with the execution of all but four months suspended, and was placed on probation for three years. He was also fined $1,000 on each count. The court of appeals affirmed (Pet. App. 1a-11a).

1. In April 1973, a special grand jury commenced an investigation of possible violations of 18 U.S.C. 224 (sports bribery) in the New York harness racing industry. During the course of its investigation, the grand jury questioned most of the harness drivers, including petitioner, who operated at Roosevelt and Yonkers Raceways (Tr. 25).[1] Among the subjects material to the grand jury's inquiry was the hidden ownership of race horses—that is, whether the registered owners of certain horses were the actual

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[1] "Tr." refers to the trial transcript. "H." refers to the post-trial hearing conducted on petitioner's motion to vacate the judgments of conviction and dismiss the indictment. "Gov. Ex. 1" is the transcript of petitioner's appearance before the grand jury on June 11, 1973; "Gov. Ex. 2" is the transcript of his grand jury testimony on September 14, 1973; "Gov. Exs. 4 and 5" are the transcript of petitioner's deposition on December 17, 1973, and the transcript of his adoption of that deposition before the grand jury on December 19, 1973.

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owners (Tr. 18-31, 159-161). Specifically, the grand jury questioned petitioner in order to determine whether Joli Timmy, a race horse registered to petitioner's wife, was in fact owned by Forrest Gerry, who was not permitted to own race horses.[2]

Petitioner appeared before the grand jury on September 14, 1973 (Gov. Ex. 2). Prior to this appearance, petitioner (who was accompanied by his attorney) and several other drivers had been given *Miranda* warnings and advised by government counsel that all were potential targets of the grand jury's investigation and could be indicted (H. 6-7, 9, 18-21, 38, 41-42; Pet. App. 24a). Petitioner then testified that in March 1973 he had purchased several horses with $43,000 in borrowed funds and that he had registered the horses in his wife's name (Gov. Ex. 2, p. 11).

Petitioner also gave the following testimony, which was alleged in the indictment to have been willfully false (Pet. App. 36a; Gov. Ex. 2, pp. 5-6, 11):

> A. Are any horses which you now own or train or have driven really owned by Forrest Gerry?
>
> A. No sir.
>
> * * * * *
>
> Q. Did you ever purchase race horses for Forrest Gerry under your name or your wife's name?
>
> A. No.

---

[2]Gerry was subsequently convicted of influencing the outcome of harness races by bribery and of conspiracy to do so, in violation of 18 U.S.C. 224. See *United States* v. *Gerry*, 515 F. 2d 130 (C.A. 2), certiorari denied, 423 U.S. 832. Gerry was not licensed by the United States Trotting Association to race horses owned by him (Tr. 27-28, 44, 47).

Q. Or anyone else's name?

A. No.

Q. Do you know if Forrest ever purchased horses under anyone else's ownership?

A. No, I don't.

Thereafter, the government attorney handling the grand jury's investigation informed petitioner's counsel of the government's serious doubts concerning the veracity of petitioner's testimony. Government counsel also suggested that petitioner's attorney encourage his client to cooperate fully with the grand jury's investigation. Accordingly, petitioner was scheduled to reappear before the grand jury on December 17, 1973.

Due to the absence of a grand jury quorum on that day because of inclement weather, petitioner instead gave a deposition, with his counsel present, on the understanding that it subsequently would be read to the grand jury (Gov. Ex. 4; H. 22-24; Pet. App. 24a-25a). At that time, and at the outset of his appearance before the grand jury on December 19, 1973, when he adopted the deposition under oath, petitioner was told that he had a "right to remain silent." On both occasions petitioner stated his willingness to testify.

The following testimony from petitioner's deposition was alleged in the indictment to have been willfully false (Pet. App. 38a-41a; Gov. Ex. 4, pp. 6-9, 10-11, and Gov. Ex. 5):

Q. What about the fifth horse?

A. I didn't want to hold any money. The fifth horse I bought outright and I believe I remember the name of the people was Ruben. Steve Ruben.

Q. And anybody else?

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A. I think he had a partner but I dealt with Steve because he was a trainer and so on and so forth and I got a bill of sale from him for the amount that I purchased the horse for and also we paid the City sales tax to the tax people for the amount on the horse.

Q. You dealt with him directly?

A. Yes.

Q. How did you pay him, with a check or cash?

A. No. Cash.

Q. Do you remember approximately when this was?

A. It was in February sometime, Hal. I don't know the exact date right offhand.

Q. How many times did you deal with him, just that one time?

A. With who is this?

Q. Mr. Ruben.

A. Just the one time, yes.

Q. And this is for the horse Joli Timmy? Is that correct?

A. Right.

Q. I would like to go over now your testimony concerning Forrest Gerry.

A. Okay.

* * * * *

Q. And did you ever have any business deals with him at all?

A. No, No.

Q. No business dealings with him?

A. No. Not that I can remember of any type. The only business dealing I ever had with Forrest Gerry was when I first met him, many years ago. It must have been fifteen years or better. A young boy come to the track was looking for a goat and I sold him a goat for $10.

* * * * *

Q. You never bought or sold horses from him?

A. No, I didn't.

Q. And he was never your agent in buying or selling any horses?

A. No.

2. The evidence at trial showed that, contrary to petitioner's testimony before the grand jury, Joli Timmy had been purchased by Forrest Gerry. Steven Rubin, the horse's trainer, had negotiated the sale with Gerry, who gave Richard Schweitzer, Joli Timmy's owner, an initial $1,000 cash payment and a subsequent payment of $2,500 in February 1973. Petitioner had not been involved in these transactions and had never been represented to Schweitzer or anyone else as the actual purchaser of the horse (Tr. 61-62, 64, 133-134, 177, 191, 238, 255-262, 266-267, 273, 277-281, 284).

At Gerry's direction, Rubin had left the horse's registration papers blank and had delivered them to petitioner, who assured Rubin that he would give the papers to Gerry. After the sale, Joli Timmy continued to race, with petitioner's wife falsely listed as his owner (Tr. 123-128, 133-135, 218, 275-276, 283).

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The government's proof on the obstruction of justice charge showed that, shortly after the sale of Joli Timmy, the grand jury's investigation into race fixing in the harness racing industry had been the subject of considerable discussion within the industry (Tr. 146-147, 159-161, 174-175). In September 1973, before the indictment against Gerry was returned, Rubin met with petitioner on instructions conveyed by Gerry's girlfriend. At petitioner's request, Rubin gave him a back-dated bill of sale for Joli Timmy, showing petitioner's wife as the owner of the horse (Tr. 135-139, 180, 182, 239-240, 243). At this meeting, petitioner told Rubin that if anyone were to question him about the horse, he should tell them that petitioner had purchased it—that "it would be better for the both of [them] * * * if [Rubin] said [Bonacorsa] bought the horse" (Tr. 138-138a, 140, 244, 249-251). A few weeks later, when Rubin advised petitioner that no one had yet questioned him about the horse, petitioner responded that Rubin should "stay with" the story that the horse belonged to petitioner (Tr. 141-142, 244-246).[3]

ARGUMENT

1. Petitioner contends (Pet. 21-22) that it was improper to call him before the grand jury in December 1973 because the government had already decided to seek an indictment against him. This Court, however, has only recently reaffirmed the settled rule that "[t]he obligation to appear is no different for a person who may himself be the subject of the grand jury inquiry." *United States* v.

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[3]Shortly thereafter, Rubin was interviewed by agents of the F.B.I. and did in fact "stay with" this false story. When he received a subpoena to appear before the grand jury, however, Rubin consulted with an attorney. He then gave another statement to the F.B.I. and testified before the grand jury, providing on both occasions substantially the same information that he later related at trial (Tr. 142, 144-147, 172, 184, 185-187, 197, 203-205).

Dionisio, 410 U.S. 1, 10, n. 8, quoted in *United States* v. *Mandujano*, No. 74-754, decided May 19, 1976, slip op. 9.[4] Furthermore, perjury is an unavailable form of protest:

> [O]ur cases have consistently—indeed without exception—allowed sanctions for false statements or perjury; they have done so even in instances where the perjurer complained that the Government exceeded its constitutional powers in making the inquiry.

United States v. *Mandujano*, *supra*, slip op. 12. See also *United States* v. *Knox*, 396 U.S. 77; *Bryson* v. *United States*, 396 U.S. 64.

In any event, any claim of unfairness is particularly suspect in petitioner's case. Prior to giving the false testimony alleged in the indictment, petitioner received *Miranda* warnings and had been told that he was a

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[4]There is no support for petitioner's claim (Pet. 21) that his appearance before the grand jury was not in furtherance of the investigation of sports bribery in the harness racing industry. Petitioner unquestionably possessed information highly relevant to the grand jury's inquiry—specifically, whether Gerry had ever acted as petitioner's agent in the sale or purchase of any horses (H. 25-26, 28)—and his status as a target did not diminish the need for this evidence. "It is entirely appropriate—indeed imperative—to summon individuals who may be able to illuminate the shadowy precincts of corruption and crime. Since the subject matter of the inquiry is crime, and often organized, systematic crime * * * it is unrealistic to assume that all of the witnesses capable of providing useful information will be pristine pillars of the community untainted by criminality." *United States* v. *Mandujano*, *supra*, slip op. 8-9.

Although petitioner also contends that he and his counsel were misled to believe that he would not be indicted (Pet. 22), petitioner did not pursue this matter at the evidentiary hearing conducted on his post-trial motion and did not examine government counsel on this point.

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potential target of the grand jury's investigation and could be indicted. Thereafter, his attorney had been advised that the government believed petitioner may have committed perjury. When petitioner appeared for his deposition on December 17, he again was told of his "right to remain silent." Nevertheless, petitioner expressed his willingness to testify and did testify on that day with his counsel present. In these circumstances, petitioner's perjury certainly was the product of his free will rather than government overreaching.

2. Petitioner contends (Pet. 14-20) that certain questions specified in the indictment as falsely answered were fatally ambiguous and were subject to an interpretation as to which his response was truthful. Count one of the indictment, however, contained a series of related false statements. It is settled that a conviction may be sustained on proof that any one such statement was perjured. See *United States* v. *Edmondson*, 410 F.2d 670, 673, n. 6 (C.A. 5), certiorari denied, 396 U.S. 966; *Arena* v. *United States*, 226 F.2d 227, 236 (C.A. 9), certiorari denied, 350 U.S. 954; *United States* v. *Otto*, 54 F.2d 277, 279-280 (C.A. 2). As the court of appeals noted (Pet. App. 8a), petitioner did not specify the allegedly ambiguous assignments of perjury at trial and has therefore waived any objections.

In any event, the court of appeals correctly concluded (Pet. App. 7a, n. 6) that petitioner's claims of ambiguity are "not supported by a dispassionate reading of the testimony." As the court noted (Pet. App. 6a-7a):

> It is clear that the grand jury was attempting to ascertain whether [petitioner] was fronting for Gerry in the purchase and alleged ownership of Joli Timmy. When viewed with anything but the partisan eye of an advocate, the questions, as they followed one upon the other, were pointed toward the development of this information.

Petitioner falsely testified in his September 14 grand jury appearance, for example, that he had purchased Joli Timmy directly from Rubin. Government counsel then inquired whether petitioner had paid Rubin in cash or by check, and petitioner responded that he had paid in cash (Pet. App. 39a). Petitioner now contends (Pet. 9) that this response was truthful since, in his view, the "uncontested" evidence at trial showed that Gerry, acting as petitioner's agent, had delivered a sum of cash to Rubin. This argument, however, cannot be sustained for two reasons. First, petitioner unequivocally denied during his grand jury appearance that Gerry had ever acted as his agent (Pet. App. 41a). Moreover, in the context of the questioning it is apparent that petitioner was asserting that he had dealt directly with Rubin and had personally paid him in cash for the horse.

Similarly unfounded is petitioner's contention that his testimony that he had dealt with Rubin "[j]ust the one time" was accurate. Although petitioner alleges (Pet. 10) that he had in fact dealt with Rubin only once (when Rubin delivered Joli Timmy to him after Gerry had purchased it), the grand jury transcript, again read in context, clearly indicates that petitioner asserted falsely that he had dealt with Rubin only on the one occasion when he had directly purchased the horse from him.[5]

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[5]Petitioner also contends (Pet. 18-20) that the prosecutor improperly alleged in closing argument that portions of petitioner's grand jury testimony, not included in the indictment, were false. However, the prosecutor expressly stated that these other statements, relating primarily to petitioner's disavowal of any business relationship with Gerry, were relevant to the question of petitioner's intent to deceive the grand jury (Tr. 475-481, 486-499a). The court also admonished the jury that petitioner could not be convicted on the basis of statements not set forth in the indictment and that such statements could be considered on the question of intent only if the jury was convinced beyond a reasonable doubt that the statements were false (Tr. 480-480a).

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In sum, petitioner had ample opportunity at trial to argue that he misunderstood the grand jury's questions or that, under his interpretation of a particular question, his answer was accurate. Resolution of these factual issues was for the jury. See *United States* v. *Chapin*, 515 F.2d 1274, 1279-1280 (C.A. D.C.), certiorari denied, No. 75-401, December 8, 1975; *United States* v. *Paolicelli*, 505 F.2d 971, 973 (C.A. 4); *United States* v. *Makris*, 483 F.2d 1082, 1087-1088 (C.A. 5), certiorari denied, 415 U.S. 914; *United States* v. *Marchisio*, 344 F. 2d 653, 661 (C.A. 2); *United States* v. *Andrews*, 370 F. Supp. 365, 368 (D. Conn.).[6]

3. Petitioner contends (Pet. 22-23) that there was a material, prejudicial variance between the indictment and proof on the obstruction of justice charge. The indictment alleged that petitioner had corruptly endeavored to obstruct the administration of justice on two occasions by influencing Rubin to give false testimony before the grand jury. Count two, on which petitioner was acquitted, alleged that one obstruction occurred during February 1973. Count three, on which petitioner was

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[6] *United States* v. *Wall*, 371 F.2d 398 (C.A. 6), on which petitioner principally relies (Pet. 15-16), is not to the contrary. In *Wall*, which involved a non-jury trial, the court's concern was not that there were two reasonable interpretations of the question, but that the government had introduced no evidence to show what the question actually meant to the defendant. 371 F.2d at 400. Furthermore, the government had conceded in that case that the question was susceptible to two equally reasonable interpretations, and the interpretation urged by the defendant was actually the more reasonable construction. Here, not only do we submit that, in context, the questions asked of petitioner were unambiguous, but also there was substantial evidence at trial from which the jury could have concluded that petitioner was fully aware of the information that the questions were designed to elicit.

convicted, alleged another obstruction occurring in September 1973. Count two of the indictment had been based on Rubin's grand jury testimony that, approximately two weeks after the sale of Joli Timmy in February 1973, petitioner and Gerry's girlfriend had directed him to prepare a false bill of sale for the horse. At trial, Rubin acknowledged that he had been mistaken in this testimony and that the incident had actually taken place in September 1973.

Petitioner's claim of variance is totally without merit in view of his acquittal on count two. Moreover, his conviction on count three was based on the same evidence as that heard by the grand jury—Rubin's testimony that petitioner, in September 1973, had told Rubin not to divulge petitioner's true ownership of Joli Timmy if he were questioned by the authorities. Although Rubin testified at trial that the preparation of the false bill of sale also occurred in September 1973, the government is not limited at trial to evidence that was introduced before the grand jury to procure an indictment.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1976.

DOJ-1976-06

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